

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Review of the Commission's Rules Regarding)	
the Pricing of Unbundled Network Elements)	WC Docket No. 03-173
and the Resale of Service by Incumbent Local)	
Exchange Carriers)	
)	
)	
)	

**REPLY COMMENTS OF
THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES**

The Association for Local Telecommunications Services ("ALTS") hereby files its reply comments in the above-referenced proceeding in response to the Commission's Notice of Proposed Rulemaking in CC Docket No. 03-173.¹ ALTS is the leading national trade association representing the interests of facilities-based competitive local exchange carriers ("CLECs"). ALTS member companies' primary objective is to provide facilities-based competition in the telecommunications market, including voice and broadband and other advanced telecommunications services. ALTS urges the Commission not to abandon its TELRIC principles for setting unbundled network element ("UNE") prices. Such a major change is not necessary to promote effective competition or to allow the incumbent local exchange carriers ("ILECs") to recover their costs. However, as described in more detail in ALTS' initial comments, minor improvements to TELRIC may be appropriate.

ALTS agrees with the Commission that more real-world attributes can and should be included in determining TELRIC rates in order to ensure ongoing consistency and accuracy. However, such attributes should not include the ILECs' embedded costs and older technology. As described in ALTS' initial comments, the current TELRIC model can accommodate the inclusion of real-world attributes such as actual rights-of-way and topography.² It is important, though, that the Commission focus on real-world attributes that would affect *any* carrier deploying facilities. The Commission should not focus on attributes that would only affect the ILEC or are entirely within the control of the ILEC. Real world attributes can be more accurately reflected in the cost calculations by reducing the use of simplifying assumptions, by gathering more detailed information concerning the “real world” characteristics of the geographic area served by the ILEC, and by using more detailed modeling algorithms. Most importantly, the Commission must ensure that the inputs considered in TELRIC proceedings are transparent and verifiable.³

The ILECs argue that TELRIC should include a mix of older and new technology, as is found in their current networks.⁴ This argument is not well founded. First, much of the older technology has already been funded by monopoly rates charged by the ILECs. But more importantly, UNE rates should be the forward-looking costs of replacement, not the historical costs of the ILECs' current networks. The ILECs present no valid evidence that focusing on their existing mix of technology would more closely reflect the costs

¹ *In the Matter of Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers*, CC Docket No. 03-173, Notice of Proposed Rulemaking, FCC 03-224 (rel. September 15, 2003) (“*NPRM*”).

² ALTS Comments at 6-10 (and corresponding sections of appended Economist's Report, at 18-30).

³ Broadview Networks et al. Comments at 65.

⁴ SBC Comments at 2; BellSouth Comments at 3; Verizon Comments at 41; Qwest Comments at 19.

they would incur in replacing those facilities.⁵ The ILECs claim that TELRIC includes an unrealistic assumption of instantaneous replacement of facilities; however, the Supreme Court has already rejected this argument noting that the realities of state rate setting proceedings necessarily force a lag between the time when an ILEC's costs would decrease and the time when a state proceeding would conclusively decrease the corresponding UNE rates. Thus, changes in TELRIC rates will occur over years, not days,⁶ making it entirely appropriate to factor in decreases in ILEC costs as they occur.

In their comments, the ILECs assert that their current network configurations should be considered optimally efficient merely because the companies have been subject to price-cap regulation for many years and therefore should have strong incentive to deploy their facilities efficiently.⁷ They further cite language from Commission orders describing how price cap regulation provides incentives for ILECs to operate and invest efficiently.⁸ ALTS agrees that compared to rate-of-return regulation, price caps should provide better incentives for ILECs to reduce costs and operate efficiently. The ILECs, however, are still monopoly providers of local services in most areas of their territories, and they continue to act like monopolists, not like efficient providers in a competitive market. Thus, the Commission should not rely on their current investments or the mix of technology in their current networks as inputs in a TELRIC analysis.

For example, Qwest cites statistics regarding the number of layoffs performed by ILECs between 2000-2002 as support for its claim that the ILECs have responded to the

⁵ See Allegiance, et al. Comments at 11.

⁶ Broadview Networks, et al. Comments at 18.

⁷ Verizon Comments at iv; Qwest Comments at 22.

⁸ Verizon Comments at 26.

incentive created by price cap regulation.⁹ However, there is no definitive correlation between a company laying off a portion of its workforce and that company operating efficiently. In fact, this data can just as easily be interpreted as evidence that the ILECs operated *inefficiently* until that period, when, in response to competitive pressures (brought about in part due to appropriate TELRIC rates), the ILECs finally began to trim their workforce. Or, just as easily, one could interpret the layoffs as evidence that the ILECs, just like the CLECs, were affected by the downturn in the market and responded by laying off some of their workforce to reduce their costs. Clearly, the mere fact that the ILECs laid off some employees does not in any way provide evidence of the efficiency of their network configuration or operations. Similarly, just because the ILECs are subject to price cap regulation does not guarantee that their operations are optimally efficient.

The ILECs also claim that TELRIC rates are below-cost, and that they have discouraged investment. Neither claim is valid. The ALTS Annual Report: State of Local Competition 2003 shows that ILEC investments have not been discouraged. The ILEC capital expenditures have not dramatically decreased in response to UNE requirements or the advent of increased competition. To the contrary, ILEC investments actually increased during the first five years following passage of the Act, and slowed over the past few years along with the rest of the telecom industry, returning to its historic mean in 2002.¹⁰ Thus, during the time when TELRIC rates were first instituted by state commissions, both the CLECs and ILECs were heavily investing in their telecom infrastructure. TELRIC has not been a deterrent to either ILEC or CLEC investment, but

⁹ Qwest Comments at 22 n.64.

¹⁰ ALTS Annual Report: State of Local Competition 2003, (<http://www.alts.org/Filings/2003AnnualReport.pdf>), at 10.

instead has helped foster a competitive environment where both incumbents and competitors have strong incentives to invest efficiently.

Moreover, the Supreme Court, in blessing the Commission's TELRIC policy, cited a prior ALTS Annual Report showing significant CLEC capital expenditures as evidence that TELRIC rates clearly had not discouraged CLECs from investing in their networks.¹¹ The ILECs disingenuously present evidence in their comments showing the decline in investment over recent years (2000-2003), as if that evidence alone indicates that TELRIC rates have discouraged investment. They conveniently ignore the sharp stock market decline, the subsequent flood of bankruptcies, the recent recession, and the general downturn in telecom markets during those years. Unquestionably, each of these economic phenomena was a major contributing factor in reducing investment throughout the industry. ALTS submits that the data found in its Annual Reports provide a more accurate presentation of industry capital investment in *all* of the years since the Commission's TELRIC policy was adopted. There is no evidence that the Commission's TELRIC policies, or competition generally, have had an adverse impact on capital investments. The downturn in investment during the past few years is due to changing economic conditions, not the Commission's regulatory policies.

Additionally, ALTS agrees with Allegiance, *et al.*, that the Commission's *Triennial Review Order* eliminated the ILEC's argument that different pricing signals are necessary to ensure broadband deployment.¹² By eliminating CLEC access to these facilities, the Commission has already forced CLECs to invest in broadband facilities in order for these competitors to provide future broadband services. Furthermore, although

¹¹ *Verizon v. FCC*, 122 S.Ct. 1646, 1675 (2002).

¹² Allegiance, *et al.* Comments at iv.

ALTS continues to believe that competition (even UNE-based competition) provides sufficient incentives for both ILECs and CLECs to deploy facilities, surely now that the ILECs have their much-requested unbundling relief, they should have more than enough incentive to deploy broadband and other facilities, especially those that will no longer be subject to TELRIC rates. Thus, there is no reason for the Commission in this proceeding to adjust TELRIC rates that apply to bottleneck facilities in order to attempt to compensate for some perceived misalignment of incentives regarding broadband deployment.

Moreover, the Commission must be careful not to undermine competition in other markets by adopting changes that would drastically increase TELRIC rates. As ALTS stressed in its initial comments, the current TELRIC pricing rules only apply to UNEs where impairment has been found, so an increase in TELRIC rates would do nothing but force CLECs to pay higher rates for network elements that cannot readily be installed by the CLECs themselves.¹³ Therefore, in most cases higher UNE rates would *not* result in greater deployment of CLEC facilities, but would translate into negative profit margins for CLECs, or higher retail rates for CLEC customers, and higher profits for ILECs.

ALTS also agrees with Covad that to the extent that competitors are not provided access to next generation features of the ILEC's network, such as fiber feeder plant, due to the Commission's *Triennial Review Order*, the costs of deploying those facilities should be excluded from UNE prices.¹⁴ Competitors should not be forced to pay for the ILEC's costs of deploying facilities that the CLECs are not permitted to purchase or use. Certainly, CLECs cannot be expected to subsidize ILECs, through UNE rates, for the

¹³ ALTS Comments at 6.

¹⁴ Covad Comments at 6.

buildout of new facilities, unbundled access to which will not be made available to CLECs. Logic would dictate, conversely, that whatever network elements and functionalities thereof, to which CLECs would be impaired without equal access, must be priced so that CLECs may compete on a level playing field with the ILEC. Furthermore, the Commission should safeguard the competitive process by establishing a UNE-based price floor for ILEC retail services that is equal to the UNE rates (including NRCs) for the elements that make up the ILEC retail service.¹⁵ If the ILECs are permitted to charge retail rates that are less than the wholesale rates they charge their competitors, they will be able to create a "price squeeze" that would prevent competitors from effectively competing. The ILECs should have no objection to a prohibition against pricing below cost.

Regarding non-recurring charges ("NRCs"), ALTS urges the Commission to ensure that those charges are TELRIC-based and that the ILECs are not permitted to double recover non-recurring costs, by also recovering for them through additional recurring charges.¹⁶ To the extent that a non-recurring cost is recovered through recurring charges, ALTS agrees with Covad that the total amount of the non-recurring cost be identified, as well as the period of time for which the recurring charge will apply.¹⁷ By clarifying its rule, the Commission will ensure that ILECs are not overcompensated for their costs.

ALTS agrees that loop conditioning charges should only apply in extraordinary cases, such as with copper loops that exceed 18,000 feet.¹⁸ Otherwise, the ILECs would

¹⁵ Allegiance et al. Comments at 33.

¹⁶ See Covad Comments at 12-18; Allegiance, et al. Comments at 31.

¹⁷ Covad Comments at 18.

¹⁸ *Id.*

be permitted to over-recover their forward-looking costs since TELRIC assumes that a loop less than 18,000 feet would be constructed of fiber and should be free of load coils and excessive bridged taps. Thus, any charges for conditioning a loop of less than 18,000 feet should already be factored into the UNE rate for the loop.¹⁹

ALTS strongly supports the Commission's proposal that charges for DC power should be based on the number of amps used rather than the number of amps fused.²⁰ ALTS has repeatedly raised this issue with the Commission regarding the ILECs' practices of overcharging CLECs based upon the amount of power available on both DC power feeds, rather than based on the amount of power the CLEC actually uses.²¹ ALTS agrees with Covad that "CLECs should pay only for what they use and no more."²² The ILECs do not pay for power that is merely fused, but not used by the CLEC; therefore, the CLEC should not be required to pay for that fused power.

Verizon argues that the Commission should provide a separate mechanism for Verizon to recover costs that it claims are not covered by TELRIC.²³ ALTS strongly opposes any such mechanism that would allow Verizon to charge CLECs for so-called costs beyond what is appropriate under a forward-looking cost methodology. Both the Commission and the Supreme Court have found that TELRIC does not produce confiscatory rates on their face and that TELRIC-based rates provide adequate cost recovery for ILECs.²⁴ As Verizon notes, the ILECs have an opportunity to provide

¹⁹ See Allegiance et al. Comments at 31.

²⁰ NPRM ¶ 147.

²¹ See ALTS Comments, CC Docket No. 01-9 (filed February 16, 2001); ALTS Letter to Dorothy Attwood, CC Docket No. 98-147 (filed March 27, 2001).

²² Covad Comments at 21.

²³ Verizon Comments at 89.

²⁴ See Allegiance, et al. Comments at 4.

evidence if they believe that specific TELRIC rates are confiscatory.²⁵ However, none of the ILECs have provided such data.²⁶ Rather, they continue to make blanket unsupported accusations that TELRIC rates are below-cost. It is clear that their primary concern is that they may earn the full amount of monopoly profits that are potentially achievable, not that they will be unable to recover their costs.²⁷ While the Telecom Act does not offer guaranteed recovery of the ILEC's embedded costs, the fact of the matter is that in recent years the ILECs have been fully recovering their embedded costs as well as earning supracompetitive (monopoly) profits.²⁸ ALTS agrees that the Commission properly found there was no support for the ILEC claim that significant residual costs would result from a forward-looking cost methodology.²⁹ If the ILECs can produce such evidence, they have recourse through the judicial system as well as at the Commission. There is absolutely no reason for the Commission to modify its TELRIC rules or to develop a separate mechanism for the ILECs to recover these alleged residual costs.

²⁵ Verizon Comments at 89-97.

²⁶ See Broadview Networks, et al. Comments at 35.

²⁷ See Broadview Networks, et al. Comments at 7.

²⁸ See ALTS Comments at 4 (and corresponding sections of appended Economist's Report at 14).

²⁹ See Allegiance, et al. Comments at 25.

CONCLUSION

The FCC need not abandon TELRIC principles in setting UNE prices in order to satisfy its goals of promoting effective competition and providing for the recovery of ILEC costs. However, improvements to the methodology can indeed be made that will satisfy the D.C. Circuit Court of Appeal's objections and remain consistent with sound economic theory.

Respectfully Submitted,

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January 30, 2004